THE HON'BLE SRI BILAL NAZKI, THE ACTING CHIEF JUSTICE

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION No. 16080 of 2005

09-09-2005

Between:

N.Fairoz Khan.

.....PETITIONER

AND

The Principal Secretary to Government of Andhra Pradesh & Others.

.....RESPONDENTS

THE HON'BLE SRI BILAL NAZKI, THE ACTING CHIEF JUSTICE

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION No. 16080 of 2005

ORDER : (Per Hon'ble Sri Bilal Nazki, ACJ)

In this Habeas Corpus petition, order dated 22.11.2004 made under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Articles Act, 1974 (hereinafter referred to as 'the Act') is challenged by the brother-in-law of one Bhathurusaman Sheik alias Hammad Sheik alias Sheik (hereinafter referred to as 'the detenu'). The order of detention was served on the detenu on 23.11.2004 while he was in Jail. State Government made a reference to the Advisory Board. The Board considered his case on 28.12.2004 and after receipt of the opinion of the Board, the State Government confirmed the detention order and directed the detention of the detenu for the maximum period of one year from 23.11.2004.

The petitioner contended that while the detenu was travelling in an Indian Airlines Flight from Chennai to Dubai via Hyderabad, he was arrested at Hyderabad and it was alleged that the examination of the detenu and checking-in of his luggage resulted in recovery of assorted foreign and Indian currency to the value of Rs.22,36,894/-. It was also alleged that the detenu made a statement in terms of Section 108 of the Customs Act on 30.10.2004 that the currency notes were handed over to him by one Iqbal Bhai of Chennai, who procured them from Burmah Bazar, Chennai for the purpose of sending these notes to Dubai. According to this alleged statement, these notes were to be handed over to a person in Dubai, wearing blue trousers and glasses near a money exchange counter in Dubai Airport. The detenu was arrested at 5.30 a.m. on 30.10.2004. His passport and the currency notes were seized. He was produced before the Special Judge for Economic Offences on 30.10.2004. He was remanded to Judicial custody up to 11.11.2004. Thereafter, the impugned detention order was passed. Later on, the remand was extended up to 25.11.2004. The detention order is challenged on various grounds. It is stated that the order of detention was passed mechanically without application of mind. The grounds were vague, irrelevant and non-existent.

Counter has been filed in which it is stated that after the detention of the detenu, the order of detention and the grounds of

detention were served on the detenu on 23.11.2004. The contents of the grounds were explained to the detenu in English and Tamil. The copies of the documents relied upon in the grounds, were also served on the detenu. He was also informed of his right to make a representation. He was also informed that he was entitled to be heard in person by the Advisory Board. The entire material relied upon for passing of the order, was sent to Ministry of Finance, Department of Revenue and Central Economic Intelligence Bureau, New Delhi on 30.11.2004. The State Government forwarded the entire material relied on for passing the order of detention, to the Advisory Board on 09.12.2004. The Advisory Board met on 28.12.2004 and after hearing the detenu, it came to the conclusion that there was sufficient cause for detention of the detenu. Thereafter, the Government confirmed the order of detention. The representation made by the mother of the detenu was also considered.

We have heard learned counsel for the parties in detail.

In the grounds of detention, it is stated that on specific intelligence that the detenu was smuggling out huge quantity of foreign currencies by concealing them in his baggage and that he had commenced his journey from Chennai to Dubai by flight No.IC 951 on 29.10.2004, the Officers of Directorate of Revenue Intelligence, in the presence of independent witnesses, requested the Airline staff to call the detenu out of the flight when the Aircraft landed at the Hyderabad Airport on 29.10.2004. At the time of interception, in the presence of two independent witnesses, the detenu identified himself as Shri Bhathurusaman Sheik. He was holding a passport bearing No.F-0457709 dated 16.9.2004 issued at Tiruchirapally, Tamil Nadu. He had two pieces of checked-in baggage apart from one handbag. He had also a ticket for Chennai-Dubai-Chennai. A telex message was also tagged to his ticket, indicating that his return ticket from Dubai was on 01.11.2004. When enquiries were made by the officers, the detenu informed them that he was carrying 95 Lungis to Dubai and he was not carrying any currency in his luggage. The statement was also recorded and on examination of his luggage, the

authorities had found 98500 Saudi Riyals, 15000 Euros. He made a statement that he was taking this money on behalf of one Iqbal, which was to be handed over to some body in Dubai and he would only get Rs.2,000/- in return. The officers also seized 16 Singapore Dollars and 10 UAE Dirhams.

In the grounds of detention in para 10, it has been stated that the detenu has been frequently going abroad and returning to India. The visits were always very short. He had departed from Chennai on 29.8.2003 and arrived at Singapore on 30.8.2003 and left Singapore on 2.9.2003 and arrived at Chennai on 2.9.2003. He again left for Singapore from Chennai on 3.9.2003 and arrived at Singapore on 4.9.2003. He departed from Singapore on 6.9.2003 and arrived at Chennai on 7.9.2003. He left for Singapore on 12.10.2003 from Chennai and reached Singapore on 12.10.2003 and left Singapore on 13.10.2003 and arrived at Cochin on 13.10.2003. In addition to this, he had obtained multiple entry visas to Malaysia, Singapore and visited very frequently for very shorter periods.

In para 12 of the grounds, the detaining authority said,

> *"In view of the above legal position, the currencies seized from you are deemed to be prohibited goods in terms of Section 2(33) of the Customs Act, 1962. Therefore, the foreign currency notes under seizure have been attempted to be carried out of India in the baggage in the above said manner in contravention of the provisions of Section 11 of the Customs Act, 1962 read with Sections 77 and 79 of the Customs Act, 1962 and hence, they are liable to confiscation under Section 113(d) and 113(h) of the Customs Act, 1962. Your acts which render the seized foreign currencies liable for confiscation under Section 113(d) and 113(h) of the Customs Act, 1962 amount to smuggling as per the provisions of Section 2(39) of the Customs Act, 1962. By the aforesaid acts of omission and commission, you have knowingly committed an offence punishable under Section 132 and 135(1) of the Customs Act, 1962 and you are also liable for penal action under Section 114 of the Customs Act, 1962."*

In para 19, it is stated that the detenu had filed a bail application on 16.11.2004 before the Court and had contended that he was only

taking Lungis and no currency was found on his person or in his baggage. Counter had been filed to this bail application on 18.11.2004 by respondents.

In para 20 of the grounds, it is stated,

> *"Therefore on careful consideration of the foregoing material, I am fully convinced that you did engage yourself in smuggling of Foreign currencies seized from you, out of India as aforesaid by concealing the same in your hand baggage without any specific or general permission from Reserve Bank of India and without declaring the same to the Customs authorities. Your confession about illegal importation of electronic goods and your frequent short trips to various countries as well as the currency seized from you clearly shows that you are involved in smuggling activities. All the above recitals reveals that you have developed the habit of indulging in illegal importation of electronic goods without payment of customs duty and smuggling of foreign currencies. Your above stated acts of omission and commission which render the goods liable for confiscation amount to smuggling as defined in Section 2(39) of Customs Act, 1962 and as adopted in Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 as amended vide Section 2(e) thereof."*

In para 22 of the grounds of detention, the detaining authority stated that the detenu was aware that the bail application had been filed and there was possibility of his being released on bail and his indulging in prejudicial activities again.

The learned counsel for petitioner submits that the only charge/ground for detention is that the detenu was indulging in taking foreign currency from the country to outside and once the passport of the detenu was seized, there remained no possibility of detenu indulging in such activities and the normal law would take care of him. It is submitted that although the detenu was arrested on 30.10.2004, yet, no charge sheet has been filed and bail was granted to the detenu after he was detained solely on the ground that the charge sheet had not been filed within the statutory period.

The learned counsel for petitioner submits that in a similar case,

the Supreme Court was of the view that once the passport was seized, there would be no chance of smuggling out the currency and hence the detention could not be upheld. He has referred to a judgment reported in *Rajesh Gulati v. Government of NCT of Delhi and another*. The facts of this case need to be mentioned very briefly. The detenu in that case was arrested on 5th July 2001 by the Customs Officers at the Indira Gandhi International Airport, New Delhi on the allegation that he had smuggled 40 mobile telephones. At the time of his arrest, the detenu handed over his passport to the Customs authorities. He made a statement under Section 108 of the Customs Act, in which he stated that he had made six trips to Dubai between 30th May 2000 and 3rd July 2001 at the instance of the Proprietor of a Firm. The Proprietor of the said Firm, in his statement under Section 108 of the Customs Act, had denied that he had any business relationship with the detenu. After his arrest, he was produced before the Magistrate and he was remanded to Judicial custody. In the meanwhile, he had filed several bail applications, which resulted in dismissal and ultimately the High Court granted him bail on 29th October 2001. Prior to that date i.e. on 28th September 2001, the order of detention was passed under the Act. One of the grounds agitated before the Supreme Court by the detenu was, *"The passport of the appellant continued to be held by the Customs authorities and that, therefore, there was no question of the appellant traveling out of the country or indulging in smuggling goods"*. This argument was countered on the ground that the detenu had, within a short span of time, smuggled goods on five separate occasions and that was sufficient to hold that the appellant would continue with smuggling activities on his release. In para 11, the Supreme Court held,

> *"We are of the view that the High Court erred in accepting the respondents' submissions and rejecting the appellant's writ application. This Court has repeatedly held that the law permitting preventive detention must be meticulously followed both substantively and procedurally by the detaining authority (See:*

Icchu Devi Choraria v. Union of India, AIR 1980 SC 1983; Vijay Narain Singhy v. State of Bihar, AIR 1984 SC 1334, 1345; Hem Lall Bhandari v. State of Sikkim, AIR 1987 SC 762, 766; Ayya @ Ayub v. State of U.P., AIR 1989 SC 364, 367). The facts of this case shows a breach of both."

In para 13, the Court held,

"In this case, the detaining authority's satisfaction consisted of two parts—one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of the detention was passed. But the detaining authority said that "bail is normally granted in such cases". When in fact the five applications filed by the appellant for bail had been rejected by the Courts (including that this was not a 'normal' case), on what material did the detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail ? The fact that the appellant was subsequently released on bail by the High Court could not have been foretold. As matters in fact stood when the order of detention was passed, the 'normal' rule of release on bail had not been followed by the courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail. (See: in this context Ramesh Yadav v. District Magistrate, AIR 1986 SC 315, 316)."

In para 14 of the judgment, the Court held,

"*Assuming that by some method of prescience the detaining authority foresaw the order of bail which was granted to the appellant on his sixth application, the question still remained, would the appellant again resort to smuggling goods into the country ? ……"*

In the present case also, we have almost the same situation—firstly, bail was granted to the detenu after the detention order is passed, that too on the ground that the charge sheet was not filed within the Statutory period of time, and secondly, the order of detention says that it has been passed with a view to prevent the detenu from

smuggling of goods. That purpose is already achieved by seizing the passport of the detenu.

Learned Counsel for respondents, however, relies on a judgment of the Supreme Court reported in *T.P.Moideen Koya v. Government of Kerala and others*. In para 19 of the judgment, the Supreme Court held,

> *"The very object of passing a detention order being to prevent the person from acting in any manner prejudicial to maintenance of public order or from smuggling goods or dealing in smuggled goods, etc., normally there would be no requirement or necessity of passing such an order against a person who is already in custody in respect of a criminal offence where there is no immediate possibility of his being released. But in law there is no bar in passing a detention order even against such a person if the detaining authority is subjectively satisfied from the material placed before him that a detention order should be passed. A Constitution Bench in Rameshwar Shaw v. District Magistrate (AIR 1964 SC 334) held as under:*
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> *"As an abstract proposition of law, there may not be any doubt that Section 3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail.""*

He also relied on another judgment reported in *Attorney General for India & others v. Amratlal Prajivandas and Others*. We do not find that this judgment is relevant for the purpose of the present case.

Since the order of detention has been passed only with a view to prevent the detenu from smuggling of goods and his passport has already been seized, we do not think that the order of detention can be sustained.

Writ petition is accordingly allowed. The impugned order of detention is quashed. No order as to costs. The detenu be released forthwith if

not needed in any other case.

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(BILAL NAZKI, ACJ)

9th September 2005.

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(G.CHANDRAIAH, J)

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